83-601

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

JOHN KATSOUGRAKIS,
Petitioner,

-against-

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10155
(212) 486-1717

CHRISTINE E. YARIS,
On the Petition

Questions Presented

1. Whether the district court erred in allowing admission of important hearsay evidence under the "statement against interest" exception to the hearsay rule contained in Fed. R. Evid. 804(b)(3)?

2. Whether, under the circumstances of this case, admission of certain hearsay violated petitioner's right to confrontation under the Sixth Amendment to the United States Constitution?

3. Whether it was error for the Court of Appeals to refuse to order a new trial on the conspiracy count after it reversed the conviction on two of the four underlying substantive offenses?

List of Parties

Apart from the party named in the caption of this Petition, the other party involved in the trial was John Hiotis, who was also convicted of the offenses charged.

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Petitioner, John Katsougrakis, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming in part the judgment of conviction entered against petitioner by the United States District Court for the Eastern District of New York (Mishler, J.).

Opinions Below

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-18a. The opinion of the trial court on petitioner's motion to set aside the verdict appears in the appendix hereto at pp. 19a-32a.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was August 12, 1983. The Court's jurisdiction is invoked under Title 28, United States Code § 1254(1).

Statutory and Constitutional Provisions Involved in the Case

Federal Rules of Evidence, Rule 804(b)(3):

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Statement of the Case

John Katsougrakis was convicted, after a jury trial, of violating the federal arson laws, Title 18 U.S.C. §§ 844(h) and 844(i) (counts two and five); mail fraud, Title 18 U.S.C. § 1341 (counts three and four) and conspiracy to violate these statutes, Title 18 U.S.C.

§ 371 (count one). As a result of this conviction, Katsougrakis was sentenced to a five-year prison sentence followed by five years of probation.[1]

On appeal, the Second Circuit reversed the convictions of violating the federal arson laws (counts two and five). The convictions on the remaining counts were affirmed.

Evidence at Trial

In the early morning of October 4, 1981, the Kings Villa Diner in Great Neck, New York, was destroyed by arson. The two arsonists, Kyriakos "Charlie" Chrisanthou and John Kynegos, died as a result of injuries sustained while setting the fire. The government claimed that John Katsougrakis and his co-defendant, John Hiotis, the owners of the diner, had paid to have their business burned. Count one of the indictment charged a conspiracy to accomplish these objectives in violation of federal law. Count two charged defendants with aiding and abetting the actual use of an explosive to set the fire. Counts three and four charged mail fraud in connection with defendants' efforts to obtain payment from the North River Insurance Company. Finally, count five alleged that defendants aided and abetted the use of an explosive to commit the crime of mail fraud.

Proof of the Arson

The government presented irrefutable proof that the Kings Villa Diner was intentionally destroyed by fire. Michael Protitch, the first police officer to respond to the scene, found the diner engulfed in huge flames and thick black sm[illegible]. (T 41)[2] In the rear of the diner

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[1] The five-year term was imposed on counts one and five, the terms to run concurrently. On count two, a term of fifteen years was imposed and suspended. On counts three and four, five-year terms were also suspended. (Sentencing minutes at 28)

[2] The letter "T" refers to the trial transcript.

he found two men, later identified as Chrisanthou and Kynegos, on fire. (T 41-42) While being administered first aid, Chrisanthou said to the officer, "this is what you get when you try to help somebody." (T 42) During his ensuing investigation, Officer Protitch saw that the rear door of the diner was partially open and that a car, later found to be owned by the arsonist Chrisanthou, was parked nearby.[3] On the rear seat of the car was an anti-freeze container which had an odor of gasoline. (T 44, 47) Officer Protitch also smelled gasoline on the clothing of both arsonists-victims. (T 44)

Lest these circumstances leave a doubt as to the origin of the fire, a number of expert witnesses were called to prove arson. Robert J. Doran, the supervisor of the Nassau County Fire Investigation Bureau, arrived on the scene when the fire was in its "final stages of suppression." (T 77) Careful inspection of the diner showed that one of three doors was opened without forcible entry. (T 79) From the patterns of the fire and intensity of the heat, Mr. Doran concluded that the fire was intentionally set. (T 94) This opinion was further confirmed by the fact that he found, on the premises, anti-freeze containers, similar to those found in the car, which had odors of gasoline. (T 81, 87) Another expert, Robert McCann, who was hired by the insurance company, testified that in his opinion the pattern and character of the fire showed that it was not accidental. (T 210)

The Case Against the Owners

Having established the arson, the government's case immediately focused on the defendants, owners of the diner. Suspicion of the owners first arose when it was found that the arsonists had apparently gained

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[3] The record erroneously identifies Katsougrakis as the owner of the car. (T 49) The context clearly shows, however, that it was Chrisanthou who owned the car. (T 55)

entry into the diner by using a key. Investigator Doran testified that he found two keys which fit the rear door of the diner in the pants pocket of one of the arsonists. (T 92-93) The government's theory was that the keys had been supplied by one of the owners. (T 997) However, the government lawyer readily admitted that he could not identify the individual who actually gave the key to the arsonists. (T 996) The evidence on this issue was somewhat confusing. The government attempted to prove, on the basis of Investigator Doran's interview with Hiotis, that there were only four sets of keys and that one set was missing. (T 100-107) Other government witnesses contradicted this testimony. For example, Steven Karagiannis, a cook at the diner, testified under cross-examination that there were sets of keys "all over the place." (T 358) Another government witness, Andrew Drepanis, a former cook at the diner, testified that he knew of nine sets of keys. (T 870)

Another contention that the government offered as circumstantial evidence of the owners' complicity in the fire was that the business was unprofitable and on the verge of collapse. Stephen Linker, the defendants' corporate accountant, testified that the business' liabilities at the time of the fire were far greater than its assets. (T 476) Furthermore, the business was substantially deficient in payroll and sales taxes. (T 477-78) Proof of insolvency, however, was disputed even by Linker himself. (T 476-77) On cross-examination, the accountant stated that the business was "operational." (T 481) Even though there was other proof of poor financial condition (T 520-21, 566), the defense called witnesses to show that the diner did have substantial value and that at least two experienced restauranteurs were negotiating to purchase the business at a price which would have left the defendants with a profit. (T 940-42, 1020)

The remainder of the government's case essentially rested on the testimony of three witnesses. As a witness

called at trial by the government, Karagiannis, one of the cooks employed by defendants, denied any specific conversation with the defendants about burning the business. (T 303) A Greek national struggling with the English language, Karagiannis would only allow that when defendants got angry with employees' performance they would say something to the effect of "I wish somebody [would] fire the place and everybody go on vacation." (T 303) Under Fed. R. Evid. 801(d)(1)(A), the witness' grand jury testimony was introduced. There, Karagiannis testified that both defendants had asked if he knew "somebody to fire the place." (T 307)

From petitioner Katsougrakis' viewpoint, one of the most critical pieces of evidence came from the testimony of Rose Marie Chrisanthou, Charlie Chrisanthou's widow. (T 370) According to Mrs. Chrisanthou, her husband told her, approximately two weeks before the fire, that he and John Kynegos were going to set a diner on fire for $3,000 each. (T 679) The diner was the Kings Villa. (T 380) In the ensuing two weeks, Charlie left home for a number of clandestine meetings and acted in a completely erratic manner. (T 383) On October 2, 1981, two days before the fire, Charlie asked his wife to drive him to Astoria, Queens, where he had to meet Kynegos and "somebody else." (T 386) The couple then drove to a coffee shop in Astoria where they met Kynegos. (T 386-87) While waiting for the other individual to appear, the arsonists told Mrs. Chrisanthou that if the person didn't show up she should drive them to Roosevelt Racetrack and they would meet the person there. (T 387)[4]

Because Mrs. Chrisanthou had left her car in a no parking zone, she, her husband and Kynegos returned

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[4] The defendants owned another Kings Villa Diner in Westbury, Long Island, near Roosevelt Raceway. (T 119-20) It was stipulated that the racetrack was not operating in October of 1981. (T 189)

to the car to find a policeman affixing a parking ticket. (T 388) Chrisanthou and Kynegos then decided to wait in the car for the man they were to meet. Presently, her husband and Kynegos pointed to an individual walking across the street and left the car to meet him, telling Mrs. Chrisanthou to leave. (T 391-92) Although observing this individual for only 45 seconds (T 393), the witness tentatively identified him as appellant Katsougrakis. ("I don't know. I believe it to be that gentleman over there.")[5] (T 394)

On another occasion, shortly before the fire, Charlie Chrisanthou told his wife that he and Kynegos had just come "from the diner" where they each received an $800 down payment for the fire. (T 395-96) This apparently was the last conversation that Mrs. Chrisanthou had with her husband before he was burned in the fire. (*Id.*)

Surely the most controversial witness called by the government at trial was Fitos Vasiliou. (T 610) Vasiliou was "very friendly" with both Chrisanthou and Kynegos. (*Id.*) Learning that his friends were mortally injured, Vasiliou paid a visit to the hospital. (T 364) Finding Chrisanthou swathed in bandages, Vasiliou asked him two questions:

> Q: What did he [Chrisanthou] say? What did you say to him and what did you do?
>
> A: I said to him, you think they set you up.
>
> The Court: Say it again. The jurors don't hear you. Say it slowly and louder.
>
> The witness: I asked him if they set him up and they burned him in the diner. So he said, no.

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[5] From the prosecution's view, this identification evidence was enhanced by what was claimed to be a false exculpatory statement. In an interview with Investigator Doran, both defendants denied knowing either of the arsonists after viewing their pictures. (T 120-21)

The Court: Did he say no, or did he just shake his head.

The witness: No he didn't say no. He go like this.

The Court: Indicating the negative. All right.

The witness: Go like this. I asked him, I said to him, you got paid to burn this place up. He goes like this.

The Court: He indicated by shaking his head up and down.

(T 635-36) Later on cross-examination the witness testified as follows:

Q: Give us the English of what you said to him in Greek.

A: You mean you got paid from the owners of the diner to burn this diner. Exactly that's what I said. And he said -- he do like this. He goes like this.

Q: Indicating an affirmative shaking of the head?

A: Yes sir.

(T 775)

Three or four days after Chrisanthou died,[6] Vasiliou went to the Westbury diner where he met Hiotis. (T 638)[7]

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[6] Chrisanthou died on October 8, 1981, four days after he was admitted to the hospital. Kynegos died on October 9, 1981. (T 279-80)

[7] Although previously stating that he had asked Chrisanthou only two questions in the hospital, Vasiliou curiously asserted that he found his way to the Westbury diner by directions given to him in the hospital by Charlie Chrisanthou:

Q: How did you know where to go?

A: I talked to Charlie. Charlie showed me the way.

* * *

(Footnote continued on following page)

In this initial meeting, Hiotis denied any responsibility for the fire. (T 642) One week later, Vasiliou went to the diner again and beseeched Hiotis to pay the families of the arsonists-victims. (T 643) According to Vasiliou, Hiotis told him that he was then without funds but that money would be given to the families when the insurance claim was paid. (T 644) Switching to a more forceful approach, Vasiliou displayed the business card of a government agent who interviewed him and threatened cooperation with the authorities unless Hiotis would "do something about it." (T 644-45) Five days later, again according to Vasiliou, Hiotis contacted him to arrange a meeting at a "Greek club" in Astoria where he gave Vasiliou $6,000 in cash.[8] (T 646-47) With this $6,000, Vasiliou left for Cyprus where he remained until the eve of trial. (T 646-51) When confronted with the fact that he had told Hiotis that the money was for the families, Vasiliou explained, "we all lie." (T 701)

The Defense Case

Apart from offering proof that the Great Neck Kings Villa was a viable business and not on the eve of financial destruction, Katsougrakis offered the testimony of nine witnesses who placed him in the Westbury diner in the early evening of October 2nd when he was supposedly meeting Chrisanthou and Kynegos on a street corner in Astoria, Queens. This partial alibi proof was very convincing. In September of 1981, there had been a kitchen fire at the Westbury diner and contractors, together with the employees,

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Q: Will you explain that, please, when he showed you the way?

A: He didn't really show me the way. He couldn't move. But by the shaking of the head, I understand what he was saying. (T 641)

[8] The court instructed the jury that this evidence of a payment by Hiotis was not to be considered against appellant Katsougrakis. (T 1464) Vasiliou testified although he saw Katsougrakis once in the diner, he never had any conversation with him.

were working frantically to reopen for dinner on Friday, October 2nd. For this reason, virtually everyone recalled the evening and that Katsougrakis, who was principally responsible for managing the Westbury diner, was present. (T 1178) The parking ticket, it will be remembered, placed the Chrisanthous in Astoria at 7:40 p.m. Their clandestine meeting took place moments later.

Richard Molinario, a regular customer of the Westbury diner, remembered the night it reopened following the kitchen fire and testified that he ate there that evening with his wife. (T 930) At approximately 8:00 p.m., he and his wife were seated by John Katsougrakis. (T 930-31) Lester Gochman, an electrical contractor who did work on the diner, testified, on the basis of his records, that he was at the diner from 11 in the morning until 9 o'clock in the evening on October 2nd. He sat down to have dinner with Katsougrakis between 6:45 and 7:30. (T 1014-15) The cashier, two cooks, a friend of Katsougrakis and several other employees strongly corroborated this evidence. (T 1041, 1056, 1063, 1088, 1100, 1111, 1117)

John Hiotis testified on his own behalf. Hiotis explained that the insurance coverage on the diner would not cover his investment and would not provide sufficient capital to rebuild. (T 1142-43) Hiotis also confirmed the fact that he had several opportunities to sell the diner at a fair and profitable price. (T 1146) Hiotis categorically denied any complicity in the arson:

> Q: Did you ever speak to anybody about burning that diner?
>
> A: No, sir.
>
> Q: Did you ever tell anybody to get in touch with any torch or arsonist for the purpose of burning the diner?
>
> A: No, sir.

(T 1163)

Hiotis also gave his version of the encounter with Vasiliou, describing it as nothing more than an extortion attempt. Hiotis testified that he immediately rebuffed Vasiliou who then came back a second time one week later. (T 1168-69) Hiotis testified that Vasiliou demanded $10,000 and once again Hiotis refused. (T 1169-70) On a third visit to the diner Vasiliou again demanded $10,000 and threatened to harm his family. (T 1171) On a fourth occasion the indefatigable Vasiliou came again, only to be told again that he would never get any money. Vasiliou's last threat was to go to the police. (T 1172-73)

The Court of Appeals Opinion

On appeal, petitioner contended, *inter alia*, that, both under Fed. R. Evid. 804(b)(3) and the Confrontation Clause of the Sixth Amendment, the trial court erred in admitting the hospital bed "statements" of the arsonist Chrisanthou and that the statements made by Chrisanthou to his wife before the fire also violated the Confrontation Clause. Additionally, in a supplemental brief submitted after the Second Circuit's decision in *United States v. Gelb*, 700 F.2d 875 (2d Cir. 1983), petitioner argued that the convictions for violating federal arson laws should be reversed and a new trial ordered on the conspiracy count.

The Court of Appeals agreed with Katsougrakis' claim that, under *Gelb*, uncontained gasoline was not an "explosive" within the meaning of the Explosive Control Act, 18 U.S.C. § 844 (1976). Accordingly, it reversed the two convictions obtained under that Act (counts two and five). It refused, however, to order a new trial on the conspiracy count, noting that it had consistently held, that if one criminal object of the conspiracy is properly proved, the conviction will be upheld on appeal even if additional criminal objects of the conspiracy are reversed. (appendix, pp. 6a-7a)

The court also declined to accept Katsougrakis' position on the admissibility of Chrisanthou's nodding of the head "statement." Specifically, it upheld the district court's determination that the three-fold requirement of Rule 804(b)(3) had been met, *i.e.*, (1) that Chrisanthou was unavailable as a witness; (2) that his statement was sufficiently reliable to warrant an inference that a reasonable man in Chrisanthou's position would not have made the statement unless he believed it to be true; and (3) that corroborating circumstances clearly indicated that the statement was trustworthy. The Court of Appeals further held that the district court was not required to assess the credibility of the in-court witness, Vasiliou, before it permitted the jury to hear about Chrisanthou's statement. It reasoned that "to require a preliminary assessment of the in-court witness' credibility would, in our judgment, be a usurpation of the jury function." (appendix, pp. 13a-14a) Thus, it declined to follow the position taken by the Fifth Circuit in *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978), and in *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977).

Also rejected was Katsougrakis' claim that the admission of the hearsay testimony about Chrisanthou's ambiguous nod of the head violated the Confrontation Clause of the Sixth Amendment. In so holding, the court reasoned that "a hearsay statement that satisfies the penal interest exception usually will survive Confrontation Clause scrutiny because the 'trustworthiness issue has already been decided in favor of admissibility." (appendix, pp. 11a-12a) Thus, since no ulterior motive to lie could be attributed to Chrisanthou and since his "nods were entirely consistent with the evidence presented at trial," no confrontation problems were shown. (appendix, p. 12a)[9]

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[9] Although Katsougrakis raised a similar claim of Confrontation Clause problems with respect to the statement relayed by Mrs. Chrisanthou, the Court of Appeals failed to discuss it in its opinion. Instead, it focused on whether this statement was admissible under Fed. R. Evid. 801(d)(2)(E) and 804(b)(3).

Reasons For Granting The Writ

Since guilt is "individual and personal" and not a matter of "mass application",[10] proof of a case against "the owner" was not sufficient to convict and imprison John Katsougrakis. Even though this was not a mass conspiracy trial, the fact remains that the case against the two diner owner-defendants had to be weighed separately. In this regard, it should first be noted that, as even the trial court conceded, the case against Katsougrakis was anything but overwhelming. (T 1000, 1004; sentencing minutes, p. 15)

The most troubling aspect of this case is that Katsougrakis may have been convicted as a result of his status as an owner of the Kings Villa diner rather than on proof of his own guilty participation. For example, the prosecutor had to speculate that one of the two owners gave the key found in the arsonist's pants pocket to the arsonist. (T 996-97) Similar problems of particular identity arose in the testimonial evidence. In recounting conversations with her deceased husband, Rose Chrisanthou implicated the "owners" of the diner without any specific reference to Katsougrakis. It is true that Mrs. Chrisanthou identified Katsougrakis as the person who clandestinely met with her husband in Astoria two days before the fire. However, her identification, which was based on only momentary observation, was equivocal (T 392-94) and was countered with the testimony of nine alibi witnesses, including disinterested third parties, who placed Katsougrakis at his Westbury diner at the time that he is supposed to have had this meeting in Astoria.

Steven Karagiannis, the former cook at the Westbury Kings Villa diner, did implicate Katsougrakis in his grand jury testimony where he recounted a conversation with "both bosses" about whether he knew someone who could burn the Great Neck diner. (T 314) Although this evidence was certainly admissible under

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[10] *Kotteakos v. United States*, 328 U.S. 750, 772 (1946).

Fed. R. Evid. 801(d)(1)(A), it was clouded with uncertainty in light of the witness' confused trial testimony and problem with the English language. (T 327-28, 360)

In the context of this frail proof, petitioner contends that the Court of Appeals erred when it declined to follow the position taken by the Fifth Circuit and, thus, to require that the trial court assess the credibility of the in-court witness Vasiliou before permitting him to testify about Chrisanthou's out-of-court "statements." Additionally, the Court of Appeals erred when it found that the admission of Chrisanthou's statements, both to Vasiliou and to Rose Chrisanthou, did not offend the Confrontation Clause. Finally, the Court of Appeals erred when it declined to follow this Court's decisions regarding the necessity of a new trial on the conspiracy count following the reversal of the convictions of one of the two underlying substative offenses.

There Exists a Conflict Between the Circuits On Whether Rule 804(b)(3) Requires an Assessment of the Credibility of the In-Court Witnesses

After extended legal argument (T 613-34), the trial court admitted Chrisanthou's hospital bed statements under Fed. R. Evid. 804(b)(3), the statement against interest exception to the hearsay rule.[11] In doing so, it refused to consider the trustworthiness of the in-court witness, Vasiliou, despite the fact that he was an admitted liar. The affirmance of this ruling by the Second

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[11] Rule 804(b)(3) provides:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Circuit created a direct conflict with the holding of the Fifth Circuit on this issue.[12] As a result, certiorari should be granted to resolve that conflict.

Although courts have generally accepted the proposition that an unavailable declarant's hearsay statements inculpating an accused are admissible if the statement is one "against interest" as defined by Rule 804(b)(3), an extremely conservative approach has evolved. As Judge Weinstein states, "[b]ecause of the dangers involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused." 4 J. Weinstein and M. Berger, *Weinstein's Evidence*, § 804(b)(3) [03], at 804-113 (1981). Thus, because of the inherent evidentiary and constitutional problems involved, there appears to be a presumption of exclusion rather than admission.

Faced with the inherent problems in admitting inculpatory statements of this type, courts have consistently read into the rule a requirement that even inculpatory statements be found to have a guarantee of trustworthiness *before* they are admitted into evidence. In *United States v. Oliver*, 626 F.2d 254, 260 (2d Cir. 1980), the Second Circuit stated that:

> Before a statement may be received as one against penal interest under Rule 804(b)(3) it must be shown (1) that the declarant is "unavailable" as a witness, (2) that the statement is sufficiently reliable to warrant an inference that "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true," and (3) that "corroborating circumstances clearly indicate the trustworthiness of the statement."

See also United States v. Palumbo, 639 F.2d 123 (3d Cir.), *cert. denied*, 102 S.Ct. 100 (1981); *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978).

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[12] It should be noted that the Third Circuit has previously adopted the same position as did the Second Circuit in the instant case. *See United States v. Atkins*, 558 F.2d 133, 135-136 (3d Cir.), *cert. denied*, 434 U.S. 929 (1977).

It is respectfully submitted that the trial court's holding, affirmed by the Court of Appeals, in regard to the trustworthiness of Chrisanthou's hospital bed "statements" was erroneously narrow. Specifically, the trial court was of the view that Vasiliou's credibility was not at issue and was irrelevant to the admissibility of Chrisanthou's statements (T 998). This conclusion was reached despite the obvious difficulty it had with Vasiliou's credibility. For example, on one occasion, the court quipped, "I would not buy a used car from Mr. Vasiliou..." (T 1262) Earlier, the court had said that it was "troubled" by Mr. Vasiliou's testimony. (T 1005)

Plainly stated, the court was required to weigh Vasiliou's credibility in making its initial determination of admissibility. In *United States v. Alvarez, supra,* the Fifth Circuit stated that: "Under Rule 804(b)(3), trustworthiness is determined primarily by analysis of two elements: *the probable veracity of the in-court witness,* and the reliability of the out-of-court declarant." 584 F.2d at 701 (emphasis supplied). This is obviously a correct view. If the court were to look only to the reliability of the out-of-court declarant's statement in judging whether there is other corroboration in the case, then the opportunity to fabricate is made child's play by simply plugging the out-of-court declaration into a convenient spot in the government's case. As stated by Professor Tague in his exhaustive analysis of this rule, "before a court determines whether a declarant's statement is against his penal interest, the court must be satisfied that the declarant made the statement attributed to him." Tague, *Perils of the Rule Making Process: the Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception,* 69 Geo. L. J. 851, 899 (1981). Since this is undoubtedly the approach when a witness seeks to exculpate a defendant by introducing an out-of-court declaration, *United States v. Bagley,* 537 F.2d 162 (5th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977), basic fairness requires that no less care and scrutiny should be afforded where the statement tends to inculpate the defendant.

The Court of Appeals Misapplied This Court's Prior Holdings When It Ruled That, in This Case, "Trustworthiness" for Rule 804(b)(3) Purposes Was Synonymous with "Reliability" for Confrontation Clause Purposes

Beyond resolution of the 804(b)(3) issue lies the constitutional question of whether Katsougrakis' right to confrontation was violated by the admission of Chrisanthou's "statement." This issue has a life of its own and exists apart from the evidentiary issue. In other words, even if this evidence were properly allowed under Rule 804(b)(3), the Constitution may still require its exclusion. The Court of Appeals failed to draw this distinction when it equated a finding of trustworthiness under Rule 804(b)(3) with a finding of reliability for Confrontation Clause purposes. It is respectfully submitted that that conclusion was clearly erroneous in view of this Court's prior decisions and that certiorari should, therefore, be granted.

The Court of Appeals relied on this Court's statement in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." In so doing, however, the court apparently ignored the caveat that such congruence can be presumed only "without more" *i.e.*, when no circumstances militating against a finding of congruence exist. This was erroneous, for as stated by this Court:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

California v. Green, 399 U.S. 149, 155-56 (1970). *Accord, United States v. Wright*, 588 F.2d 31, 37 (2d cir. 1978), *cert. denied*, 440 U.S. 917 (1979) ("That the testimony was admissible under the rules of evidence does not, however, conclude our inquiry, but merely turns our attention to the constitutional issue involved. The confrontation clause is not merely the equivalent of the hearsay rules.")

Petitioner respectfully submits that this case is one of those cases where a congruence between trustworthiness for hearsay exception purposes and reliability for confrontation purposes simply does not exist. Thus, the lack of opportunity to cross-examine the declarant Chrisanthou in this case resulted in a constitutional violation. *Bruton v. United States*, 391 U.S. 123 (1968). Even recognizing that there are circumstances under which out-of-court declarations may be admitted without opportunity for cross-examination, *Ohio v. Roberts, supra; Dutton v. Evans*, 400 U.S. 74 (1970), application of an exception to the hearsay rule in this case would be unconstitutional as applied because of the inherent unreliability of the "statement."

In order to satisfy what must still be considered the stringent requirements of the confrontation clause, there can be no serious question about the reliability of a declaration. Chrisanthou's hospital bed "statement" cannot be elevated to a plane where the constitutional mandate of confrontation is deemed satisfied. To begin with, Chrisanthou was in remarkably poor physical and arguably mental condition. Surely, this fact is relevant to a determination of trustworthiness and reliability. *E.g., United States v. Palumbo*, 639 F.2d 123, 133 (3d Cir.), *cert. denied*, 102 S. Ct. 100 (1981) (Adam, C. J., concurring) ("[declarant's] personal history, marked by frequent use of drugs and treatment for psychological disorders, further weakens her untrustworthiness.") Furthermore, the circumstances of Chrisanthou's response to Vasiliou's question do not smack of reliability. This was not some dying confession from Chrisanthou. Rather, this was a weak response

(witness the inability to articulate) to a leading and loaded question, rife with the potential for prejudice. In response to the question allegedly put to him, can we be at all certain that Chrisanthou's nod of the head adopted the plural in the question allegedly put by Vasiliou? In other words, assuming that everything Vasiliou said was true, Chrisanthou did not seem to have the physical ability to in any way correct the form of Vasiliou's question or change the reference from "owners," the plural, to "owner," the singular. Thus, this very unusual "statement" does not appear at all to have the clear and convincing aura of reliability required to satisfy the Confrontation Clause.

Another circumstance must be examined. A statement placing blame on others to explain an uncomfortable predicament is inherently suspect. "Shifting the blame" usually arises in the context of a post-arrest statement to law enforcement authorities where the declarant confesses and inculpates the accused. Sixth Amendment problems aside, such admissions are routinely excluded because the motive to make them is highly suspect. *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981); *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert. denied*, 102 S. Ct. 2303 (1982); *United States v. Palumbo, supra; United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981). But there is nothing talismanic about post-arrest confessions to law enforcement agents. Each case must be decided on a case-by-case basis. Indeed, in *United States v. Garris*, 616 F.2d 626 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980), the court found such a statement admissible because of particular guarantees of trustworthiness.

Simply put, there are no equivalent guarantees in this case. The fact that the statement was made under these circumstances, in a hospital room, is not without significance. Although there is no evidence that there had been an arrest, Chrisanthou had suffered the ultimate defeat. Not only was he caught in criminal conduct, indeed, in *flagrante delicto*, he was obviously crushed by the reality of his physical predicament. Human nature suggests that it was quite easy to respond to a question which allowed him to shift the focus

from himself to others. The incentive to do so under these circumstances is undoubtedly comparable to the clearheaded person who is making a calculated attempt to minimize his own culpability. Here, unlike the case of *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980), we do not have the kind of free expression of self-incriminating statements made during the course of a conspriacy when there is no apparent motive to fabricate.

To label Chrisanthou's "statements" as reliable for constitutional purposes, would allow virtually any statement fitting the prosecution's theory of the case to be admitted once it satisfied the federal rules of evidence. Petitioner respectfully submits that more than that is constitutionally required. Especially in a case such as this, where a post-conspiracy statement is admitted to inculpate the accused, the most traditional circumstance where cross-examination is constitutionally appropriate, the proposed hearsay must be subjected to microscopic examination to make certain that it is not vulnerable to any interpretation of significant untrustworthiness. In this case, Chrisanthou's "statements" could not possibly withstand such close scrutiny. For these reasons, as a constitutional matter, those statements should have been excluded.

For the same reasons, the evidence supplied by Mrs. Chrisanthou about her husband's statements to her was admitted in violation of petitioner's Sixth Amendment right to confrontation of witnesses. *Bruton v. United States, supra.* The evidence supplied by Mrs. Chrisanthou, as the government will readily admit, was crucial to the government's case and devastating to the defense. However, Charlie Chrisanthou's statements left completely unclear whether John Katsougrakis was involved. If ever there was a need to "confront" a witness this would be the case. The most simple and straightforward cross-examination may well have elicited the fact that Katsougrakis was not involved. Yet, the defense was never given the opportunity to dispel this

notion. Under the circumstances of this case, therefore, petitioner was denied his Sixth Amendment right to confrontation.

The Court of Appeals Failed to Follow This Court's Prior Holding and Thus Created a Conflict Between the Circuits When It Held That a Reversal of the Conviction of One of the Two Objects of the Conspiracy Does Not Require a Reversal of the Conspiracy Conviction

The conspiracy count of petitioner's indictment charged multiple objectives, including arson and mail fraud. Although the substantive mail fraud counts were not affected by the reversal by the Court of Appeals of the substantive arson counts, petitioner contends that a new trial on the conspiracy count is required. The Court of Appeals' failure to grant such relief is in direct conflict with both this Court's decisions and with the decisions of other Circuits. Accordingly, certiorari should now be granted.

It is quite possible that the jury's finding of guilt on the conspiracy count was predicated upon the arson rather than the mail fraud. In its charge, the court instructed the jurors that they could find guilt if there was an attempt to further any one of the objects of the conspiracy:

> Three. That thereafter a conspirator, any conspirator -- count one charged that on or about October 1, 1981, the defendant John Katsougrakis, Chrisanthou and John Kynegos met and conferred. Well, if the government proved that beyond a reasonable doubt and you find that it was done knowingly, in furtherance of the purpose of the conspiracy -- *it need be any one of the objects of the conspiracy*, either to maliciously destroy, the diner by the use of an explosive, or the other objective, to commit a mail fraud on the insurance company;...
>
> * * *

> *It is not necessary for the prosecution to prove that...all the objects of the conspiracy were accomplished.*
>
> In order to prove the existence of the conspiracy, *it is necessary* that the evidence establish to your satisfaction *that one or more of means or methods described in the indictment was agreed upon* to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment.

(T 1482-83) (emphasis supplied)

The conspiracy charge in this indictment, as previously noted, was count one. The next count, count two, was the substantive charge of destroying the diner by means of an explosive in violation of § 844(i). In the conspiracy count itself, the violation of § 844(h) was spelled out as the first objective of the conspiracy and the destruction of the diner appeared as the second alleged objective, with the mail fraud charges following as the third objective. Clearly, therefore, under the court's instructions, guilt on the conspiracy count could have been decided without the jury ever reaching the question of mail fraud *as it applied to the conspiracy.*

A case directly on point is *Yates v. United States,* 354 U.S. 298 (1957). In *Yates,* the defendant was charged with a conspiracy to accomplish two objects -- violent overthrow of the government and the organization of the Communist Party to accomplish that goal. The trial court instructed the jury only that it had to find that the "the conspiracy charged in the indictment" had been proved beyond a reasonable doubt. *Id.* at 311, n.16. This court held that, since the statute of limitations had run on the second object, the entire conviction had to be reversed because it was impossible to tell which objective the jury had selected. *Id.* at 311-312. *Cf. Stromberg v. California,* 283 U.S. 359, 367-368 (1931) (general verdict on one count had to be reversed where it could have been returned under any one of three clauses of the statute, one of which had been declared unconstitutional).

A similar result was reached in *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). In *Dansker*, the defendants were charged with two substantive Travel Act violations pertaining to the bribery of two public officials. Count two pertained to the attempted bribery of the Mayor of Fort Lee, New Jersey. Count three related to the bribery of an official of the Fort Lee Parking Authority. Count one was a conspiracy whose objects were the conduct alleged in both substantive offenses. As in the instant case, the trial court charged that either of the illegal objectives could serve as a basis to convict the defendants of conspiracy. On appeal, the circuit court found that the conduct alleged in count three did not violate the Travel Act. Although affirming the conviction on count two, the court reversed the conspiracy conviction and remanded that count for a new trial. In arguing against this result the government pointed to the conviction on count two to support the validity of the conspiracy conviction. Rejecting this argument the court stated:

> Hence, it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged.
>
> In the instant case, the possibility thus remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II. As a result, the defendants' conspiracy convictions must be vacated and this case remanded to the district court for a new trial unless it determines that Count I, in its present form, is fatally defective in light of the conclusions reached herein.

537 F.2d at 51. *See also United States v. Kavazanjian*, 623 F.2d 730, 739 (1st Cir. 1980); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978), *cert. denied*, 444 U.S. 1040 (1980); *United States v. Baranski*, 484 F.2d 556, 559-561 (7th Cir. 1973).

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
150 East 58th Street
New York, New York 10155
(212) 486-1717

CHRISTINE E. YARIS,
On the Petition

Dated: October 7, 1983

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1029, 1030 — August Term, 1982

(Argued March 14, 1983 Decided August 12, 1983)

Docket Nos. 82-1392, 82-1400

UNITED STATES OF AMERICA,
Appellee,

-v.-

JOHN KATSOUGRAKIS, JOHN HIOTIS,
Defendants-Appellants.

Before:
MANSFIELD, MESKILL and NEWMAN
Circuit Judges.

Appeal from judgments entered in the United States District Court for the Eastern District of New York, Mishler, *J.*, convicting appellants of mail fraud, 18 U.S.C. §§ 1341-42 (1976), conspiracy, 18 U.S.C. § 371 (1976), and use of an explosive to destroy a commerical building, 18 U.S.C. § 844 (1976).

Affirmed in part, reversed in part.

Gerald L. Shargel
New York, New York
For Appellant Katsougrakis

Jeffrey A. Rabin
Brooklyn, New York
(Jacob R. Evseroff, Brooklyn, New York
of Counsel), *for Appellant Hiotis.*

Jane Simkin Smith, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

MESKILL, *Circuit Judge:*

John Katsougrakis and John Hiotis appeal from judgments entered in the United States District Court for the Eastern District of New York, Mishler, *J.*, after a jury trial convicting them of (1) conspiracy to commit mail fraud and to maliciously destroy a business premises by means of an explosive, 18 U.S.C. § 371 (1976) (Count I); (2) aiding, abetting and procuring persons to maliciously damage and destroy a business premises by means of an explosive, 18 U.S.C. § 844(i) (1976) (Count II); (3) two counts of mail fraud, 18 U.S.C. §§ 1341-42 (1976) (Counts III & IV); and (4) aiding, abetting and inducing persons to commit a felony (mail fraud) by means of an explosive, 18 U.S.C. § 844(h) (1976) (Count V).

The convictions obtained under the Explosive Control Act, specifically Counts II and V of the indictment, are reversed in light of our decision in *United States v. Gelb*, 700 F.2d 875 (2d Cir. 1983). The convictions on the remaining counts are affirmed.

BACKGROUND

Katsougrakis and Hiotis were co-owners of the stock in Mousaka Trading Corporation (MTC). MTC owned and operated two New York restaurants, one located in Great Neck and the other in Westbury, both under the trade name "Kings Villa Diner." The Westbury diner operated at a profit whereas the Great Neck diner sustained serious losses during 1979-81.[1] In fact, tax records

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[1] Stephen Linker, the accountant for Kings Villa, and Jacob Moser, an accountant for the Nassau County Police Department, both testified that in their expert opinion Great Neck Kings Villa was not a profitable corporation due to the high ratio of its current liabilities (approximately $125,000) to its current liquid assets ($3,184).

introduced at trial revealed that liens had been levied against the Great Neck Kings Villa by the State Tax Commission, the New York State Unemployment Insurance Division and the federal government to recover substantial unpaid tax liability. When appellants were unable to sell the Great Neck diner, they resorted to arson.

Steven Karagiannis, who worked as a cook at the Westbury Kings Villa for five or six months during 1981, testified at trial that Katsougrakis and Hiotis approached him in July 1981 and inquired whether he knew any individuals who would be willing to set fire to the Great Neck diner. Although Karagiannis was unable to help them and in fact refused to discuss the scheme further, appellants ultimately did locate two individuals—Kyriakos "Charlie" Chrisanthou and John Kynegos—who were willing and able to carry out the arson. After several meetings, the conspirators planned the arson for the early morning hours of October 4, 1981. Appellants agreed to pay Chrisanthou and Kynegos $3,000 each for their efforts, with $800 to be paid in advance.

On October 4, Chrisanthou and Kynegos arrived at the diner at approximately 3:00 a.m., entered through the back door using a key provided by appellants and spread uncontained gasoline throughout the diner. After igniting the gasoline, Chrisanthou and Kynegos were unable to escape the inferno. Although flames were doused shortly thereafter by Nassau County firemen, the damage had already been done—both men died several days later in the Nassau County Hospital.

Subsequent investigations by the Nassau County Fire Marshal's office, the Nassau County Police Department and a private firm commissioned by the insurer of the Kings Villa Diner confirmed that the fire was intentionally set by use of uncontained gasoline. The police also obtained a statement from Chrisanthou's wife Rose Marie in which she related that (1) Chrisanthou told her

two weeks before the fire that he had agreed to set fire to a diner and that he showed her the Kings Villa business card; (2) two days before the fire, October 2, 1981, she drove her husband and Kynegos to a coffee shop in Astoria where they met with appellant Katsougrakis; and (3) on October 3, 1981, less than one day before the arson, Chrisanthou stated to her that he had just returned from a diner on Old Country Road (where Kings Villa is located) and had received the $800 advance.

Katsougrakis and Hiotis were indicted and, after a jury trial, were convicted on each count in the indictment. Judge Mishler sentenced appellants to five year terms of imprisonment on Counts I and V, sentences to run concurrently. They were sentenced to a fifteen year prison term on Count II and to five year terms on both Counts III and IV, sentences also to run concurrently. Execution of sentence was suspended on Counts II, III and IV and appellants were placed on probation for a term of five years, with the probationary period scheduled to commence after appellants had served prison terms imposed on Counts I and V. This appeal followed.

DISCUSSION

I. Gelb *Issue*

Section 1102 of the Explosive Control Act, 18 U.S.C. § 844 (1976) (Act),[2] makes it unlawful to maliciously damage or destroy a commercial premises by means of an "explosive." "Explosive" is defined in the penal section of the Act to include:

> [G]unpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders,

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[2] Although commonly referred to as the Explosive Control Act, the legislation at issue here is properly characterized as Title XI of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title XI, § 1102, 84 Stat. 952 (1970).

> other *explosive* or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j) (1976) (emphasis added). An explosive is further defined as:

> (5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

18 U.S.C. § 232(5) (1976). Appellants claim that the substance used to set fire to the Kings Villa Diner—uncontained gasoline—is not an "explosive" within the meaning of the Act and cite as support for that proposition our recent decision in *United States v. Gelb,* 700 F.2d 875 (2d Cir. 1983), which was decided after these convictions.

In *Gelb,* we decided that arson committed by use of uncontained gasoline is not punishable under the Explosive Control Act. We observed that the Act was intended to accomplish an important, albeit limited, purpose:

> The legislative history of the Act speaks of the dangers posed by subversive groups in the society. The perceived threat lay not so much in ideology or political objective, but rather focused on the alarming trend during the late 1960s when "selective bombing" emerged as a frequent vehicle for extreme social and political protest.

700 F.2d at 878. Accordingly, we reversed the judgment of conviction on the explosives counts, holding that uncontained gasoline was not an "explosive" within the meaning of section 844(j) because the legislative history of the Act:

> strongly supports the view that the Act was envisaged as anti-bombing, *not anti-larson*, legislation. We find nothing in the language or legislative history of the Act to challenge this conclusion. Moreover, responsibility for the investigation and prosecution of crimes involving common law arson has traditionally been left to the states, and we are reminded that: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Id. at 878-79.

The government seeks to distinguish *Gelb* on the ground that proof at trial showed that an explosion actually occurred during the Kings Villa blaze. The government misunderstands our holding in *Gelb;* the fact that an explosion occurred is not determinative under the Act. The important question is whether an "explosive," as defined by the Act, 18 U.S.C. § 844(j) (1976), has been used in the commission of the allegedly criminal act. The evidence is uncontroverted that the blaze at Kings Villa was caused by use of uncontained gasoline—a typical arson. Since there are no persuasive reasons for distinguishing this case from *Gelb*, the convictions obtained under the Explosive Control Act—Counts II and V in the indictment—are reversed.

Appellants urge that the conspiracy count must also fall in light of our decision in *Gelb*. We have consistently held, however, that if one criminal object of the conspiracy is proved by clear and convincing evidence, the conspiracy conviction will be upheld on appeal even if additional criminal objects of the conspiracy are re-

versed. *See, e.g., United States v. Mowad*, 641 F.2d 1067, 1073-74 (2d Cir.), *cert. denied*, 454 U.S. 817 (1981); *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976). In this case, one object of the alleged conspiracy—mail fraud—was proved by clear and convincing evidence and accordingly we affirm the conspiracy conviction.

Appellants acknowledge the *Mowad/Dixon* precedent, but urge that since the "explosives" charge was the more serious crime, we should remand to the district court for reconsideration of their sentences. While in a different case remand might be appropriate, we will not do so here. The fact that uncontained gasoline is not an "explosive" for purposes of the Explosive Control Act does not detract from the serious nature of appellants' acts. The evidence remains clear and convincing that appellants conspired with Chrisanthou and Kynegos to burn the Great Neck Kings Villa with the intent to defraud their insurer. We see no justification for a remand for resentencing.

Because the conspiracy and mail fraud counts are based in part on evidence admitted by the district court and challenged on appeal, we proceed to consider appellants' remaining claims.

II. *Evidentiary Rulings*

A. *Chrisanthou's "Nodding of Head"*

On the day following the Kings Villa fire, Fitos Vasiliou visited his friend Charlie Chrisanthou at the Nassau County Medical Center. Although Chrisanthou was badly burned and wrapped virtually from head to toe in bandages, Vasiliou was permitted to converse briefly with his friend. As recounted by Vasiliou at trial, the following colloquy took place during their visit:

> [Prosecutor]: What did he [Chrisanthou] say? What did you say to him and what did you do?
>
> [Vasiliou]: I said to him, you think they [Katsougrakis and Hiotis] set you up?

The Court: Say it again. The jurors don't hear you. Say it slowly and louder.

The Witness: I asked him if they set him up and they burned him in the diner. So he said, no.

The Court: Did he say, no, or did he just shake his head?

The Witness: No, he didn't say, no. He go like this.

The Court: Indicating the negative. All right.

The Witness: Go like this. I asked him—I said to him, you got paid to burn this place up. He go like this.

The Court: He indicated by shaking his head up and down [indicating the affirmative].

J. App. at 172-73.

Vasiliou further testified that he proceeded to the Westbury Kings Villa where he accused Hiotis and Katsougrakis of complicity in the arson and threatened that he would take his story to the police unless the wives of the dead men were "compensated." According to Vasiliou, Hiotis initially denied any involvement in the scheme, but later agreed to pay $6,000 for Vasiliou's "silence."[3] Vasiliou was subpoenaed to testify before the grand jury, but he never appeared, choosing instead to seek refuge in Cyprus. He did return, however, several days before trial and related under oath the substance of his various conversations with Chrisanthou and appellant Hiotis.

The district court, over the objection of defense counsel, permitted Vasiliou to recount his October 5, 1981 conversation with Chrisanthou in the Nassau County Hospital, including the various "nods" made by the

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[3] After the initial meeting between Vasiliou and Hiotis, Vasiliou was interviewed by an arson investigator, Phillip Horbert, for the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). At a subsequent meeting with Hiotis, Vasiliou brandished the business card of the ATF agent; this gesture apparently convinced appellants that Vasiliou's threats were serious.

decedent in response to Vasiliou's inquiries. On appeal, Katsougrakis and Hiotis charge that their constitutional rights under the Confrontation Clause were abridged by the admission of this hearsay testimony and further that the "nods" constitute inadmissible hearsay not falling within one of the recognized exceptions to that rule.[4]

A troublesome evidentiary question is presented when the government seeks to introduce a hearsay statement which is against the declarant's penal interest and which also inculpates the accused. Ordinarily, a statement against penal interest has clear guarantees of trustworthiness because, human nature being what it is, a person is unlikely to implicate himself criminally unless he was in fact involved in the criminal undertaking. The veracity of the hearsay statement may be questioned, however, when the declarant also inculpates a third party. For example, if during custodial interrogation the declarant perceived an opportunity to curry favor with the government by implicating both himself and a third party, he may choose this course in the hope of gaining immunity or a reduced sentence. *See United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980). Since the declarant may in that circumstance have less than honorable motives for volunteering his "statement," that portion of the hearsay which inculpates the accused must be scrutinized carefully. The importance of this issue has prompted much scholarly debate, *see e.g.*, Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule*

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[4] The parties correctly concede that a "nod" is a statement for purposes of the hearsay rule and will be held to constitute hearsay if introduced to prove the truth of the matter asserted (i.e., a positive or negative answer in response to a particular question). *See United States v. Ross*, 321 F.2d 61, 69 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963) (pointing of finger held to be a statement for purposes of hearsay rule). Here, the government unquestionably offered this testimony to prove the truth of the matter asserted, *i.e.* that appellants participated in the arson scheme.

804(b)(3)'s Penal Interest Exception, 69 Geo. L.J. 851 (1981); Westen, *The Future of Confrontation*, 77 Mich. L. Rev. 1185 (1979); Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 Hofstra L. Rev. 32 (1973), and although divergent views have been expressed, the courts generally agree on the relevant legal standard. *See, e.g., Ohio v. Roberts* 448 U.S. 56, 65-66 (1980); *United States v. Oliver*, 626 F.2d at 260-63; *United States v. Garris*, 616 F.2d 626, 629-31 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980). The moving party must show by a preponderance of the evidence that the "dual inculpatory" statement falls within a recognized exception to the hearsay rule and that attending circumstances confirm its trustworthiness. *United States v. Oliver*, 626 F.2d at 262; *United States v. Garris*, 616 F.2d at 630. Introduction of the hearsay statement under these circumstances does not offend the Confrontation Clause because there is strong indicia of reliability.

In this case, the government relied on Rule 804(b)(3) of the Federal Rules of Evidence, the penal interest exception to the hearsay rule, to meet its threshold burden.[5] To satisfy this exception, the proponent must show "(1) that the declarant is 'unavailable' as a witness, (2) that the statement is sufficiently reliable to warrant an inference that 'a reasonable man in [the declarant's] position would not have made the statement unless he

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[5] Rule 804(b)(3) provides:

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

believed it to be true,' and (3) that 'corroborating circumstances clearly indicate the trustworthiness of the statement.'" *United States v. Oliver*, 626 F.2d at 260 (quoting Fed. R. Evid. 804(b)(3)); *see United States v. Lieberman*, 637 F.2d 95, 103-04 (2d Cir. 1980).

Chrisanthou was unavailable to testify since he had died prior to trial. The "nods" clearly tended to subject Chrisanthou to criminal liability—by affirmative nod he admitted complicity in the criminal undertaking. Moreover, circumstances surrounding the conversation confirmed the reliability of the hearsay declaration and Chrisanthou's belief in its truth. The declarant was approaching death and was talking privately with his friend when the challenged admission was made. He was not conversing with police or other government agents whose favor he might be expected to curry. *See, e.g., United States v. Lieberman*, 637 F.2d at 103; *United States v. Garris*, 616 F.2d at 631-32. Indeed, if his intent was to implicate appellants falsely, he could have responded in the affirmative when asked whether Katsougrakis and Hiotis "set him up." Finally, corroborating circumstances confirm the trustworthiness of the statement. The evidence at trial showed that the Great Neck Kings Villa was experiencing recurring financial problems and that appellants twice tried to sell the diner. Expert testimony proved that the fire was intentionally set and the jury was free to infer that Katsougrakis and Hiotis were the only persons with a strong motive to have the diner destroyed by fire. In fact, Karagiannis testified that appellants asked him several months before the fire whether he knew anyone who could "do the job." Finally, the testimony of Rose Marie Chrisanthou and the nonhearsay testimony of Vasiliou concerning his meeting with Hiotis and the $6,000 payment provide further corroboration. The hearsay "nods" fall safely within the penal interest exception to the hearsay rule.

Appellants argue that even if the Chrisanthou "nods" satisfy Rule 804(b)(3), they do not survive

constitutional scrutiny under the Confrontation Clause. Katsougrakis and Hiotis correctly point out that even though a hearsay statement may fall within a hearsay exception, the statement of an unavailable declarant will nonetheless be excluded under the Confrontation Clause unless the court is satisfied that "it bears adequate 'indicia of reliability.' " *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)); *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). As a practical matter, however, a hearsay statement that satisfies the penal interest exception usually will survive Confrontation Clause scrutiny because the "trustworthiness" issue has already been decided in favor of admissibility. The Supreme Court has reaffirmed this view, holding that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. at 66.

Chrisanthou's nods fall within a "firmly rooted hearsay exception" and the corroborating circumstances detailed previously fully confirm their trustworthiness. As noted earlier, the principal danger of hearsay statements that implicate both the declarant and the accused is that the declarant may have some ulterior motive for volunteering evidence against both parties—the declarant may confess hoping to gain immunity or a reduced sentence in return for his cooperation in convicting the accused. *See United States v. Garris*, 616 F.2d at 631; *United States v. Lang*, 589 F.2d 92, 97 (2d Cir. 1978) (this Court intimates in dictum that a hearsay statement which satisfies the penal interest exception may have been inadmissible if the declarant knew he was volunteering this information to a government informant); *see generally* 4 J. Weinstein & M. Berger, Weinstein's Evidence Para. 804(b)(3)[03], at 804-94-96 (1976). Here, there is no persuasive showing that Chrisanthou had an ulterior motive when conversing with his friend Vasiliou. His nods were entirely consistent with the evidence presented at trial; no confrontation problems are shown here.

Appellants urge that notwithstanding the merits of their hearsay and confrontation claims, the district judge erred by engaging in factfinding concerning the credibility of Vasiliou *after* notice of appeal had been filed.[6] Relying on *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978), and *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977), Judge Mishler determined that given the serious confrontation dangers attendant to admission of a hearsay statement that directly inculpates the accused, the trial judge must be satisfied that the in-court declarant is credible *before* permitting the jury to hear the hearsay statement. The judge conceded that credibility findings should be made *prior* to the introduction of the hearsay statement, but noted that his failure to do so did not materially affect appellants' rights because in retrospect Vasiliou was a credible witness.

The district judge erred by engaging in factfinding after notice of appeal had been filed. It is well settled that the filing of a timely and effective notice of appeal from a final judgment divests the court of jurisdiction to amend or otherwise reconsider that judgment.[7] *See Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 972-73 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976); 9 J. Moore, B. Ward, J. Lucas, Moore's Federal Practice Para. 203.11 (2d ed. 1983). However, the "jurisdictional" defect is harmless in this case because we hold that the trial judge need not evaluate the credibility of the in-court witness before allowing admission of the hearsay statement.

We do not adopt the position taken by the Fifth Circuit that the credibility of the in-court witness must

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[6] Notice of appeal was filed on November 18, 1982, Judge Mishler's Memorandum of Decision was entered on December 13, 1982.

[7] The trial court is not, however, barred from correcting clerical errors under Fed. R. Crim. P. 36 or from acting to aid the appeal. 9 J. Moore, B. Ward, J. Lucas, Moore's Federal Practice Para. 203.11 (2d ed. 1983).

be evaluated *before* the jury is permitted to hear testimony that inculpates both the out-of-court declarant and the accused. *See United States v. Alvarez*, 584 F.2d at 701; *United States v. Bagley*, 537 F.2d at 167. We hold that the district judge must only be satisfied that the statement falls within a firmly recognized exception to the hearsay rule and that attending circumstances confirm its trustworthiness. While the hearsay declarant is, and necessarily must be, unavailable to testify, the in-court witness takes the stand and is subject to cross-examination. The jury is able to observe firsthand the witness' demeanor and response to questions; it may assess without obstacle the credibility of the witness. Indeed, to require a preliminary assessment of the in-court witness' credibility would, in our judgment, be a usurpation of the jury function. *See United States v. Atkins*, 558 F.2d 133, 137 (3d Cir.), *cert. denied*, 434 U.S. 929 (1977); Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo. L.J. 851, 974 (1981); *see also Dutton v. Evans*, 400 U.S. 74, 88 (1970) ("From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of the fact, is a reliable informant not only as to what he has seen but also as to what he has heard." (footnote omitted)); *United States v. Lieberman*, 637 F.2d 95, 104 n.12 (2d Cir. 1980). We do not read the language or legislative history of Rule 804(b)(3) to contemplate a wholesale intrusion into the jury's function.[8]

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[8] Since we hold that appellants' rights under the Confrontation Clause were not abridged, there is no need to consider the alternative ground advanced by the district judge for admission of the Chrisanthou "nods," *i.e.*, that appellants waived their right of confrontation by "participat[ing] in the criminal activities leading to Chrisanthou's death." J. App. at 45; *see United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982). We voice no opinion on this alternative ruling.

B. *Statements of Rose Marie Chrisanthou*

Appellants next argue that the district court erred by allowing Chrisanthou's wife Rose Marie to testify with respect to certain statements made by her husband prior to the arson. Rose Marie testified in substance that:

(1) approximately two weeks prior to the fire Chrisanthou stated that he and John Kynegos were to be paid $3,000 each for "torching" a diner and then showed her a business card with the name Kings Villa Diner printed on it;

(2) Chrisanthou's request on October 2, 1981 that she drive him to Astoria to meet with John Kynegos and "somebody else," who she later identified as appellant Katsougrakis; and

(3) on October 3, 1981, the day before the fire, Chrisanthou informed her that he planned to meet Kynegos and another individual to discuss the criminal scheme and, upon returning, stated to her that he had come from a diner on "Old Country Road" (where the Kings Villa was located) and had received $800 as a down payment for the arson.

Judge Mishler correctly ruled that these hearsay statements were admissible under either the penal interest exception to the hearsay rule, Fed. R. Evid. 804(b)(3), or because they were statements of a co-conspirator in furtherance of the conspiracy, Fed. R. Evid. 801(d)(2)(E).

Turning first to rule 804(b)(3), we have observed that:

> The Rule does not require that the declarant be aware that the incriminating statement subjects him to immediate criminal prosecution. Rather, it simply requires that the incriminating statement sufficiently *"tended"* to subject the declarant to criminal liability "so that a reasonable man in his position would not have made the statement unless he believed it to be true."

United States v. Lang, 589 F.2d 92, 97 (2d Cir. 1978), *quoted in United States v. Lieberman*, 637 F.2d at 104. The disputed statements clearly "'tended' to subject the declarant to criminal liability"—with each statement, Chrisanthou provided more evidence of his complicity in the arson scheme. Moreover, the "marital" communications were corroborated by expert testimony of fire and police investigators, by testimony concerning the financial condition of the diner, by Karagiannis' testimony and the non-hearsay portions of Vasiliou's testimony. Chrisanthou had no motive to lie to his wife and had reaffirmed his resolve to commit the arson on several occasions over a two week period. The district judge did not abuse his discretion in ruling that corroborating circumstances confirmed the trustworthiness of the hearsay declaration. *See United States v. Winley*, 638 F.2d 560, 562 (2d Cir. 1981), *cert. denied*, 455 U.S. 959 (1982); *United States v. Guillette*, 547 F.2d 743, 754 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977).

Chrisanthou's statements to his wife were also properly admitted under the co-conspirator exception, Fed. R. Evid. 801(d)(2)(E).[9] A co-conspirator's statements will be admitted against the accused if the government can show by a preponderance of the evidence "that a conspiracy existed, that both the defendant and the declarant participated in it, that it was in existence at

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[9] Rule 801(d)(2)(E) provides:

(d) Statements which are not hearsay. A statement is not hearsay if—

. . . .

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) *a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.*

(emphasis added).

the time the statement was made, and that the statement was made in furtherance of the conspiracy." *United States v. Lieberman*, 637 F.2d at 102 (citing *United States v. Lyles*, 593 F.2d 182, 194 (2d Cir.), *cert. denied*, 400 U.S. 972 (1979); and *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970)).

The evidence presented at trial, including testimony from Karagiannis, Vasiliou and Rose Marie Chrisanthou, clearly established that Charlie Chrisanthou, Katsougrakis, and Hiotis were members of the arson conspiracy and that the conspiracy was in existence at the time the challenged statements were made. Chrisanthou's representations furthered the conspiracy because, with his wife's assistance and knowledge—if not complete approval—he was able to carry out his criminal responsibilities with greater facility. The disputed statements were properly admitted by the district judge.

C. *"Hit Man" Testimony*

During cross-examination of Vasiliou, defense counsel asked the witness whether he had mentioned in a prior interview with a federal agent that Chrisanthou and Kynegos had a "reputation for being what is known as hit men." The government promptly objected and demanded an offer of proof. When none was forthcoming, the trial judge sustained the government's objection, while also ruling that Chrisanthou's credibility was not subject to collateral attack.

Although the trial judge erred in ruling that Chrisanthou's credibility could not be attacked at trial, *see* Fed. R. Evid. 806, the judge correctly excluded any reference to "hit men" after counsel was unable to show a good faith basis for that line of questioning. Although counsel may explore certain areas of inquiry in a criminal trial without full knowledge of the answer to anticipated questions, he must, when confronted with a demand for an offer of proof, provide some good faith basis

for questioning that alleges adverse facts. Counsel failed to advance any grounds to corroborate the "hit man" inquiry other than to note that a private investigator hired by the defense suspected that Chrisanthou and Kynegos were "thugs." However, the defense could not produce a source or other information to verify its suspicions. The trial judge properly sustained the government's objection.

We have considered appellants' remaining claims and find them to be without substantial merit. The convictions on Counts II and V are reversed. The judgments of the district court are affirmed in all other respects.

Appendix B
Decision of United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JOHN KATSOUGRAKIS and
JOHN HIOTIS,

Defendants.

CR 82-316

Memorandum of Decision

December 13, 1982

APPEARANCES:

HONORABLE RAYMOND J. DEARIE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Max Sayah, *Assistant United States Attorney*

GERALD L. SHARGEL, ESQ.
Attorney for Defendant
150 East 58th Street
New York, New York 10022

MISHLER, *District Judge*

John Katsougrakis was tried before a jury, together with his co-defendant John Hiotis, and both men were found guilty of violating the Federal Arson Laws, Title 18 U.S.C. §§ 844(h) and 844(i); Mail Fraud, Title 18 U.S.C. § 1341 and Conspiracy, Title 18 U.S.C. § 371.

On November 18, 1982, the date of sentencing, the court denied a motion made by Katsougrakis (joined in by Hiotis) for a new trial pursuant to Rule 33, Fed.R.Cr.P. This memorandum of decision discusses only one of the grounds asserted in that motion.

Defendants claim that the admission of testimony given by Fitos Vasiliou of the statement made by Kyriakos Chrisanthou was prejudicial error requiring a new trial. Chrisanthou's out-of-court statement was admitted as a statement against penal interest, an exception to the hearsay rule, pursuant to Rule 804(b)(3), Fed.R.Evid.[1] (Tr. p. 626). Admission was based upon my finding that the statement was corroborated by other testimony and "bears the mark of truthfulness." (Tr. p. 624-25).

FACTS

Defendants were the owners of the Kings Villa Diner in Great Neck, New York. They were convicted of maliciously destroying the diner by fire. Chrisanthou, one of the two arsonists allegedly hired by the defendants was severely burned in the diner fire and succumbed at the Nassau County Medical Center a few days later. The other arsonist also died as a result of

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[1] Rule 804(b)(3) under "Hearsay exceptions" provides:

(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

the fire. At the trial Vasiliou testified that he visited his friend, Chrisanthou, at the hosptial. Chrisanthou's body, including his head, was swathed in bandages so that only his eyes and lips were exposed. Vasiliou testified as follows:

Direct Testimony:

Q. What did he [Chrisanthou] say? What did you say to him and what did you do?

A. I said to him, you think they set you up?

THE COURT: Say it again. The jurors don't hear you. Say it slowly and louder.

THE WITNESS: I asked him if they set him up and they burned him in the diner. So he said, no.

THE COURT: Did he say no, or did he just shake his head?

THE WITNESS: No, he didn't say no. He go like this.

THE COURT: Indicating the negative. All right.

THE WITNESS: Go like this. I asked him, I said to him, you got paid to burn this place up. He goes like this.

THE COURT: He indicated by shaking his head up and down.

(Tr. pp. 635-38).

Cross-Examination

Q. Give us the English of what you said to him in Greek.

A. You mean you got paid from the owners of the diner to burn this diner. Exactly that's what I said. And he said -- he do like this. He goes like this.

Q. Indicating an affirmative shaking of the head?

A. Yes, sir.

(Tr. p. 775).[2]

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[2] The affirmative answer was not noted on the record. However, since on cross-examination the same question was asked, the court assumes from that answer that Chrisanthou answered in the affirmative (Tr. p. 775).

The court conducted a hearing on the admissibility of the evidence outside the presence of the jurors prior to its ruling. (Tr. pp. 613-634). The government urged that the statement be admitted under various hearsay exceptions, including Rules 804(b)(3) and (5).[3] Failure to comply with the notice provision of Rule 804(b)(5) was explained by Assistant U.S. Attorney Sayah, who represented that until that very morning he was not aware of the availability of the testimony. (Tr. p. 626). Vasiliou had been interviewed by F.B.I. special agents in January, and denied knowing the owners of the diner. Vasiliou was subpoenaed to appear before the Grand Jury in May (four months before the trial). Sayah represented that just prior to the Grand Jury appearance date, Vasiliou told him that he didn't understand English and required a Greek interpreter. Vasiliou then failed to appear the following week on the adjourned date set with Sayah. The government's search for him in the following months was fruitless (until the Friday before trial). Sayah advised defendants' counsel before the trial that the government was attempting to locate

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[3] Mr. Sayah began by suggesting that Chrisanthou's statement was admissible pursuant to Rule 801(d)(2)(E) as a co-conspirator's statement. (Tr. p. 616). The court questioned this analysis (Tr. 616-20) and asked whether the government asserted that the statement was made under belief of impending death, admissible pursuant to Rule 804(b)(2). (Tr. 614, 620-26). Ultimately, the government relied upon Rule 804(b)(3), respecting statements against interest, as the basis for admission and the court found Chrisanthou's statement to be admissible on that basis. We do not overlook the admissibility of the offered statement under rule 804(b)(2). Although this rule does not require that the defendants be charged with homicide (as suggested by Mr. Sayah), we note that a state court charge against the defendants could have been brought in connection with the two deaths caused by the fire. Clearly, the reliability of Chrisanthou's statement does not turn on whether the defendants were charged with homicide or whether such charge would be brought in a federal forum. rule 804(b)(2) focuses on the declarant's belief that his death is imminent and, indeed, the court concluded that, under the circumstances of his physical condition, Chrisanthou believed that he was dying. (Tr. 623, 625).

Vasiliou and believed that he left the country to avoid testifying. (Tr. p. 630). It is important to note that Sayah's account of Vasiliou's conduct has never been challenged.[4]

The court found Chrisanthou's statement was corroborated and "bears the mark of truthfulness." The statement was held to be a statement against interest and admissible pursuant to Rule 804(b)(3). Vasiliou then testified to the jury concerning Chrisanthou's statement.

Vasiliou also testified that a few days after his hospital visit with Chrisanthou he met with Hiotis at the Kings Villa Diner in Westbury. He stated that he charged Hiotis with responsibility for the fire. He testified that he visited Hiotis again. This time Vasiliou told Hiotis that he had been contacted by law enforcement officers and that he was ready to cooperate with them in their investigation unless he received money. Later Hiotis phoned and arranged to pay Vasiliou $6,000 as a bribe with the understanding that Vasiliou would remain out of the government's reach. Vasiliou complied and went to Cypress for about six weeks, returning August 15.

When Hiotis testified at the trial he corroborated Vasiliou's testimony concerning the visits to the diner and the demand for a payment.[5] Hiotis denied making any payment.

DISCUSSION

I find that Chrisanthou's "affirmative nod" was properly admitted as a statement against his own

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[4] This is consistent with Vasiliou's testimony concerning the receipt of a $6,000 bribe from Hiotis.

[5] Hiotis testified that he talked with Vasiliou in the men's room of the diner (as Vasiliou had stated) and claimed that Vasiliou demanded $10,000.

interest with sufficient indicia of trustworthiness to overcome Confrontation Clause objections. The statement was admitted pursuant to Rule 403(b)(3) which provides:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * * *
>
> (3) *Statement against interest.* A statement which ...so far tended to subject him to civil or criminal liability,...that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The rule is silent respecting the situation before this court where the challenged statement is offered to inculpate the accused. I note that a "particularly troublesome problem"[6] arises respecting a defendant's constitutional right of confrontation[7] when a hearsay statement is admitted pursuant to Rule 403(b)(3) for such purpose. Nonetheless, confrontation clause considerations have not compelled the adoption of a blanket

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[6] 4, J. Weinstein and M. Berger, Weinstein's Evidence Para. 804(b)(3)[03] at 804-109 (1981). Commentators Weinstein and Berger suggest that "[b]ecause of the dangers [of prejudice] involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused." *Id.* at 804-13.

[7] The Sixth Amendment to the Constitution of the United States provides:

> *Rights of the accused.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

exclusion of such statements.[8] *See Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980); *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981); *United States v. Palumbo*, 639 F.2d 123 (3d Cir.), *cert. denied*, ____ U.S. ____ , 102 S. Ct. 100 (1981). Indeed, courts addressing this question have assumed admissibility of such statements provided that the statement satisfies a more stringent scrutiny respecting its trustworthiness than is required by the language of the rule. *United States v. Riley, supra*, 657 F.2d at 1383; *United States v. Palumbo*, (Adams, J. concurring), *supra*, 639 F.2d at 131; *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); *United States v. Bagley*, 537 F.2d 162, 167 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075, 97 S. Ct. 816 (1977).

This evolving court-fashioned test regarding inculpatory statements offered for admission under Rule 804(b)(3) is set forth in Judge Adams' scholarly concurring opinion in *United States v. Palumbo, supra*, 639 F.2d at 129-34.[9] Familiarity with the concurring opinion

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[8] Similarly, guaranties of trustworthiness have been held to satisfy the constitutional requirement of confrontation with respect to statements admitted under the general hearsay exception, Rule 804(b)(5). *United States v. West*, 574 F.2d 1131, 1136 (4th Cir. 1978); *United States v. Medico*, 557 F.2d 309, 314 n.4 (2d Cir.), *cert. denied*, 434 U.S. 986, 98 S. Ct. 614 (1977), and *United States v. Carlson*, 547 F.2d 1346, 1355-57 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S. Ct. 2174 (1977). *See also* cases decided prior to the enactment of the current Federal Rules of Evidence. *Mancusi v. Stubbs*, 408 U.S. 204, 213, 92 S. Ct. 2308, 2313 (1972); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 218-20 (1970).

[9] The majority opinion in *Palumbo* is in agreement with Judge Adams' view, 639 F.2d at 128, n.5. Judge Higginbotham held in *Palumbo* that the out-of-court statements made by declarant Pfaff naming the defendant as the source of certain drugs were not sufficiently reliable to satisfy the requirement of trustworthiness under Rule 403(b)(3). The declarant testified in this case, but said she lacked "memory of the subject matter of" the statement, See Rule 804(A)(3). Her grand jury testimony was read inculpating the defendant. The declarant was in custody when she testified before the

(Footnote continued on following page.)

in *Palumbo* is assumed for the purposes of this opinion so that it is not necessary to restate here the extensive legislative history and persuasive analysis set forth by Judge Adams. Briefly stated, the conclusion that Congress did not intend inculpatory declarations to be outside the scope of Rule 804(b)(3) is explained as follows:

> The dispute between the Senate and the House thus arose from differing judgments concerning the propriety of codifying evolving evidentiary principles based on constitutional considerations. Congress decided ultimately that limitations on admissibility mandated by the Confrontation Clause should be left to the courts to propound and refine. There is no indication, however, of a clash of opinion within the Congress about whether traditional justifications for hearsay exceptions apply to inculpatory declarations against interest. Significantly, no Congressional committee suggested that inculpatory declarations are insufficiently reliable to be included within the Rule 804(b)(3) exception. The legislative history suggests, if anything, the contrary, for if either House had entertained such an opinion, it would have had no need to address the *Bruton* question; unrealiability is an adequate--indeed, the historical--reason for treating hearsay statements as inadmissible.
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> In my view, then, the history of the drafting of Rule 804(b)(3) is not inconsistent with a construction which allows the admission of declarations

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(Footnote continued from preceding page.)
grand jury. The court held that the statement does not "qualify as against interest" citing the Advisory Committee Note to Rule 804 which, *inter alia*, states "Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest." *Id.* at 127, citing *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979) and *United States v. Bailey*, 581 F.2d 341, 345-46 & n.4 (3rd Cir. 1978).

> against interest that inculpate the accused. Since inculpatory declarations by third parties are excluded neither by the history nor by the terms of the Rule, I would suggest that the Rule be interpreted as authorizing their admission, provided, of course, that admission would not abridge the defendant's rights under the Confrontation Clause of the Sixth Amendment.

639 F.2d at 130.

Rule 804(b)(3) clearly contemplates the admission of hearsay statements inculpating an accused in certain circumstances. To test the admissibility of Chrisanthou's statement the court applies the three-part standard set forth in the United States Court of Appeals in *Alvarez, supra,* 584 F.2d at 701 and cited with approval by Judge Adams in *Palumbo* below as satisfying the demands of the confrontation clause.

> With respect to inculpatory statements against interest, I believe the admission is proper only when it is demonstrated that "corroborating circumstances clearly indicate the trustworthiness of the statement. . . .When combined with the conditions already written into Rule 804(b)(3) this yields a three-part test for the admissibility of inculpatory declarations against interest; the statement is receivable only if (1) the declarant is unavailable as a witness; (2) the statement is so far contrary to the declarant's pecuniary, proprietary, or penal interest that a reasonable person would not have made the statement unless he believed it to be true; and (3) the trustworthiness of the statement is corroborated by the attendant circumstances.
> (Citations omitted).

639 F.2d at 131. The court in *Alvarez* stated that trustworthiness under the third prong of the test is "determined primarily by analysis of two elements: the

probable veracity of the in-court witness, and the reliability of the out-of-court declarant," relying upon *United States v. Bagley, supra* at 167 to introduce the element of scrutiny of the in-court witness. Thus, in the case before the court, it is necessary to apply the requirements of Rule 804(b)(3) and, in doing so, to seek corroboration of the statement of the out-of-court declarant (Chrisanthou) and to examine the credibility of the in-court witness (Vasiliou).

First, there is no question that the deceased declarant was unavailable. Second, I find that the declarant's nod was a statement, Rule 801(a), Fed.R.Evid.; *United States v. Ross*, 321 F.2d 61, 69 (2d Cir.), *cert. denied*, 375 U.S. 894, 84 S. Ct. 170 (1963) (pointing found to be "as much a communication as a statement") that was "so far contrary to [his penal] interest that a reasonable person in his position would not have made the statement unless he believed it to be true." A direct confession of criminal guilt is clearly "against interest," especially where, as here, the declarant's statement is the spontaneous response to a friend's question. Concerns respecting the trustworthiness of an inculpatory statement made while a declarant is in custody, as possibly motivated to "curry favor with the authorities," are not relevant here. *Cf. Palumbo, supra*, 639 F.2d at 132, *United States v. Oliver*, 626 F.2d 254, 261 and 261 n.9 (2d Cir. 1980); *Alvarez, supra*, 584 F.2d at 701. Further, any notion that the declarant's statement was motivated by revenge is clearly dispelled by his negative response when Vasiliou asked if the "owners set him up and burned him in the diner."

Third, I find that corroborating circumstances clearly indicate the trustworthiness of the statement. The government's proof that the owners of the diner had paid the arsonists to set a torch to the diner was clear and convincing. Mrs. Chrisanthou testified that her husband had received a down-payment of $800 before the fire destroyed the premises; she identified Katsou-

grakis as the individual who met with the arsonists,[10] Kyriakis Chrisanthou and John Kynegos in Astoria on October 2, 1981 to finalize plans for the fire. The government proved beyond a reasonable doubt that the fire was of incendiary origin and that only the owners had a motive to destroy the diner by fire, i.e., to collect the insurance proceeds. No motive for lying by [Chrisanthou] has been shown. Having established the fact of the transaction and Chrisanthou's role in the transaction, the inference that he "would not have made the statement unless he believed it to be true" is compelling. *See United States v. Goins*, 593 F.2d 88, 90-92 (8th Cir.), *cert. denied*, 444 U.S. 827, 100 S. Ct. 52 (1979).

Last *Alvarez* and *Bagley* require that this court examine the credibility of Vasiliou's in-court testimony to establish the trustworthiness of the statement offered.[11] Mr. Sayah's report of Vasiliou's pre-trial conduct is not contested. The reasonable inference drawn from Vasiliou's failure to appear before the grand jury, his flight to Cypress, and his absence from this country until August 13, is that he had information inculpating defendants. His conduct corroborates his testimony that Hiotis paid him $6,000 for his silence. The only information that Vasiliou possessed which was of any appreciable value to the law enforcement authorities was the statement made by the declarant. Since the attempt to suppress evidence may be admitted into evidence to show a consciousness of guilt, *United States v. Rucker*, 586 F.2d 899, 904 (2d Cir. 1978); *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), it may also show that the witness was in possession of evidence, the defendant

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[10] We note that the problem of double hearsay is not relevant here. *Cf. United States v. Medico*, 557 F.2d 309, 319 (Mansfield, J. dissent).

[11] Defendant's brief refers to the court's statement, "I would not buy a used car from Mr. Vasiliou. . ." (Tr. p. 1262) as referring to the court's assessment of Vasiliou's credibility. The statement is out of context. The court's statement referred to the anticipated treatment of Vasiliou's testimony in summation by counsel.

believed inculpated him. The conduct of Hiotis is strong corroborative evidence of the trustworthiness of Vasiliou's testimony. Accordingly, I hold that Chrisanthou's out-of-court statement was properly admitted in evidence as an exception to the hearsay rule, pursuant to Rule 804(b)(3).

I find that the defendants' constitutional rights of confrontation have not been abridged. Alternatively, I find that the right of confrontation was waived by the defendant's participation in the criminal activities leading to Chrisanthou's death.

In a recent decision, the Court of Appeals for the Second Circuit held that the grand jury testimony of an unavailable witness would be admissible upon a finding by the trial court that the defendant was involved in the death of such witness. *United States v. Mastrangelo*, Docket No. 82-1148 (2d Cir. November 15, 1982) (slip op. at 247). The court held that a defendant waives his right of confrontation by certain conduct and that in the event of such waiver, a court may avoid reaching the "difficult legal and constitutional issues arising under the confrontation clause" and the general hearsay exception, Rule 804(b)(5). *Mastrangelo, supra*, slip op. at 244.

While *Mastrangelo* involved the murder of a witness, Bennett, the broad language of the court appears to cover the situation here. The court stated:

> If the District Court finds that Mastrangelo was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other way, it must hold his objections to the use of Bennett's testimony waived.
> (Slip op. 247).

Here, a chain of events were set in motion by the defendants which resulted in the death of the declarant. Defendants were clearly "involved" although no claim

is made that the resulting deaths were intended. Nonetheless, the policy underlying the court's decision in *Mastrangelo* as stated below, seems applicable to the unintended result here as well.

> The Supreme Court has recognized on several occasions that the right of confrontation may be waived not only by consent, but 'at times even by misconduct.' 'Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.' Thus, if a witness' silence is procured by the defendant himself, whether by chicanery, . . . by threats, . . . or by actual violence or murder, . . . the defendant cannot then assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him. Any other result would mock the very system of justice the confrontation clause was designed to protect.
> (Slip op. at 245-46).

It is clear that defendant's participation in the criminal activities charged resulted in the death of the declarant, the government has also shown by clear and convincing proof that defendants paid Vasiliou to avoid his appearance before the grand jury in May and encouraged him to leave the United States for Cypress until August 13. The government was not aware of the availability of Vasiliou's testimony until the eve of trial and Vasiliou refused to testify until he received a grant of immunity which was issued just prior to the offer of his testimony. I conclude that the defendants waived their right of confrontation based upon their conduct: (1) intentional involvement in a dangerous arson plot which resulted in the declarant's death from second and third degree burns, and (2) intentional attempt to prevent Vasiliou from providing testimony

here.[12] "The Sixth Amendment right of confrontation does not stand as a shield to protect the accused from his own misconduct and chicanery." *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174 (1977); *see also Diaz v. United States*, 223 U.S. 442, 459, 32 S.Ct. 250, 255 (1911). As in *Mastrangelo*, the defendants here should not be able to take advantage of their own misconduct with respect to Chrisanthou's death by reliance on the confrontation clause to challenge the admissibility of Chrisanthou's out-of-court statement.

CONCLUSION

I find it was not error to admit the testimony of Vasiliou relating Chrisanthou's response to his questions as set forth above.

/s/ Jacob Mishler

U. S. D. J.

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[12] Similarly, if Vasiliou's testimony was admitted pursuant to Rule 804 (b)(5) this court would have ruled that the defendants had waived their right to prior notice as required under that rule. The witness was unavailable until the day of testimony due to the defendants' inducement. Defendants were aware of (1) the government's efforts to obtain the witness' presence at trial and (2) the substance of his testimony in advance of trial.